

105TH CONGRESS
1ST SESSION

S. 79

To provide a fair and balanced resolution to the problem of multiple imposition of punitive damages, and for the reform of the civil justice system.

IN THE SENATE OF THE UNITED STATES

JANUARY 21, 1997

Mr. HATCH (for himself, Mr. KYL, and Mr. THOMAS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide a fair and balanced resolution to the problem of multiple imposition of punitive damages, and for the reform of the civil justice system.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Civil Justice Fairness
5 Act of 1997”.

6 **SEC. 2. TABLE OF CONTENTS.**

7 The table of contents is as follows:

Sec. 1. Short title.

Sec. 2. Table of contents.

TITLE I—PUNITIVE DAMAGES REFORM

Sec. 101. Definitions.

- Sec. 102. Multiple punitive damages fairness.
 Sec. 103. Uniform standards for award of punitive damages.
 Sec. 104. Effect on other law.

TITLE II—JOINT AND SEVERAL LIABILITY REFORM

- Sec. 201. Several liability for noneconomic loss.

TITLE III—CIVIL PROCEDURAL REFORM

- Sec. 301. Trial lawyer accountability.
 Sec. 302. Honesty in evidence.
 Sec. 303. Fair shifting of costs and reasonable attorney fees.

TITLE IV—HEALTH CARE LIABILITY REFORM

- Sec. 401. Definitions.
 Sec. 402. Limitation on noneconomic damages in health care liability actions.
 Sec. 403. Statute of limitations.
 Sec. 404. Periodic payment of future damages.
 Sec. 405. State no-fault demonstration projects.

TITLE V—MISCELLANEOUS PROVISIONS

- Sec. 501. Federal cause of action precluded.
 Sec. 502. Effective date.

1 **TITLE I—PUNITIVE DAMAGES** 2 **REFORM**

3 **SEC. 101. DEFINITIONS.**

4 In this title:

- 5 (1) CLAIMANT.—The term “claimant” means
 6 any person who brings a civil action and any person
 7 on whose behalf such an action is brought. If such
 8 an action is brought through or on behalf of an es-
 9 tate, the term includes the claimant’s decedent. If
 10 such action is brought through or on behalf of a
 11 minor or incompetent, the term includes the claim-
 12 ant’s legal guardian.

1 (2) CLEAR AND CONVINCING EVIDENCE.—The
2 term “clear and convincing evidence” is that meas-
3 ure or degree of proof that will produce in the mind
4 of the trier of fact a firm belief or conviction as to
5 the truth of the allegations sought to be established.
6 The level of proof required to satisfy such standard
7 is more than that required under preponderance of
8 the evidence, but less than that required for proof
9 beyond a reasonable doubt.

10 (3) HARM.—The term “harm” means any le-
11 gally cognizable wrong or injury for which punitive
12 damages may be imposed.

13 (4) ECONOMIC DAMAGES.—The term “economic
14 damages” means objectively verifiable monetary
15 losses including medical expenses, loss of earnings,
16 burial costs, loss of use of property, costs of repair
17 or replacement, costs of obtaining substitute domes-
18 tic services, loss of employment and loss of business
19 or employment opportunities, to the extent such re-
20 covery is allowed under applicable Federal or State
21 law.

22 (5) NOMINAL DAMAGES.—The term “nominal
23 damages” means damages less than or equal to
24 \$500.

1 (6) PERSON.—The term “person” means any
 2 individual, corporation, company, association, firm,
 3 partnership, society, joint stock company, or any
 4 other entity (including any governmental entity).

5 (7) PUNITIVE DAMAGES.—The term “punitive
 6 damages” means damages awarded against any per-
 7 son or entity to punish or deter such person or en-
 8 tity, or others, from engaging in similar behavior in
 9 the future.

10 (8) SPECIFIC FINDINGS OF FACT.—The term
 11 “specific findings of fact” means findings in written
 12 form focusing on specific behavior of a defendant.

13 (9) STATE.—The term “State” means any
 14 State of the United States, the District of Columbia,
 15 Puerto Rico, the Northern Mariana Islands, the Vir-
 16 gin Islands, Guam, American Samoa, and any other
 17 territory or possession of the United States, or any
 18 political subdivision thereof.

19 **SEC. 102. MULTIPLE PUNITIVE DAMAGES FAIRNESS.**

20 (a) FINDINGS.—Congress finds that—

21 (1) multiple or repetitive imposition of punitive
 22 damages for harms arising out of a single act or
 23 course of conduct may deprive a defendant of all the
 24 assets or insurance coverage of the defendant, and

1 may endanger the ability of future claimants to re-
2 ceive compensation for basic out-of-pocket expenses
3 and damages for pain and suffering;

4 (2)(A) the detrimental impact of multiple puni-
5 tive damages exists even in cases that are settled,
6 rather than tried, because the threat of punitive
7 damages being awarded results in a higher settle-
8 ment than would ordinarily be obtained; and

9 (B) to the extent this premium exceeds what
10 would otherwise be a fair and reasonable settlement
11 for compensatory damages, assets that could be
12 available for satisfaction of future compensatory
13 claims are dissipated;

14 (3) fundamental unfairness results when anyone
15 is punished repeatedly for what is essentially the
16 same conduct;

17 (4) Federal and State appellate and trial
18 judges, and well-respected commentators, have ex-
19 pressed concern that multiple imposition of punitive
20 damages may violate constitutionally protected due
21 process rights;

22 (5) multiple imposition of punitive damages
23 may be a significant obstacle to comprehensive set-
24 tlement negotiations in repetitive litigation;

1 (6) limiting the imposition of multiple punitive
2 damages awards would facilitate resolution of mass
3 tort claims involving thousands of injured claimants;

4 (7) Federal and State trial courts have not pro-
5 vided adequate solutions to problems caused by the
6 multiple imposition of punitive damages because of
7 a concern that such courts lack the power or author-
8 ity to prohibit subsequent awards in other courts;
9 and

10 (8) individual State legislatures can create only
11 a partial remedy to address problems caused by the
12 multiple imposition of punitive damages, because
13 each State lacks the power to control the imposition
14 of punitive damages in other States.

15 (b) GENERAL RULE.—Except as provided in sub-
16 section (c), punitive damages shall be prohibited in any
17 civil action in any State or Federal court in which such
18 damages are sought against a defendant based on the
19 same act or course of conduct for which punitive damages
20 have already been sought or awarded against such
21 defendant.

22 (c) CIRCUMSTANCES FOR AWARD.—If the court de-
23 termines in a pretrial hearing that the claimant will offer
24 new and substantial evidence of previously undiscovered,
25 additional wrongful behavior on the part of the defendant,

1 other than the injury to the claimant, the court may award
 2 punitive damages in accordance with subsection (d).

3 (d) LIMITATIONS ON AWARD.—A court awarding pu-
 4 nitive damages pursuant to subsection (c) shall—

5 (1) make specific findings of fact on the record
 6 to support the award;

7 (2) reduce the amount of the punitive portion
 8 of the damage award by the sum of the amounts of
 9 punitive damages previously paid by the defendant
 10 in prior actions based on the same act or course of
 11 conduct; and

12 (3) prohibit disclosure to the jury of the court's
 13 determination and action under this subsection.

14 (e) APPLICABILITY AND PREEMPTION.—

15 (1) IN GENERAL.—Except as provided in para-
 16 graph (3), this section shall apply to any civil action
 17 brought on any theory where punitive damages are
 18 sought based on the same act or course of conduct
 19 for which punitive damages have already been
 20 sought or awarded against the defendant.

21 (2) APPLICATION TO TRIALS.—Except as pro-
 22 vided in paragraph (3), this section shall apply to all
 23 civil actions in which the trial has not commenced
 24 before the effective date of this Act.

1 (3) DAMAGES UNDER OTHER FEDERAL OR
 2 STATE STATUTE.—This section shall not apply to
 3 any civil action involving damages awarded under
 4 any Federal or State statute that prescribes the pre-
 5 cise amount of punitive damages to be awarded.

6 (4) PREEMPTION.—This section shall not pre-
 7 empt or supersede any existing Federal or State law
 8 limiting or otherwise restricting the recovery for pu-
 9 nitive damages to the extent that such law is incon-
 10 sistent with the provisions of this section.

11 **SEC. 103. UNIFORM STANDARDS FOR AWARD OF PUNITIVE**
 12 **DAMAGES.**

13 (a) FINDINGS.—The Congress finds that—

14 (1) punitive damages are imposed pursuant to
 15 vague, subjective, elastic and often retrospective
 16 standards of liability, and these standards vary from
 17 State to State;

18 (2) the magnitude and unpredictability of puni-
 19 tive damage awards in civil actions have increased
 20 dramatically over the last 30 years, unreasonably in-
 21 flating the cost of settling litigation, and discourag-
 22 ing socially useful and productive activity;

1 (3) the Supreme Court of the United States has
 2 recognized that a punitive damage award can be un-
 3 constitutional if the award is grossly excessive in re-
 4 lation to the government's legitimate interest in the
 5 punishment and deterrence of unlawful conduct; and

6 (4) excessive, arbitrary, and unpredictable puni-
 7 tive damage awards disrupt, impair and burden
 8 interstate commerce, imposing unreasonable and un-
 9 justified costs on consumers, taxpayers, govern-
 10 mental entities, large and small businesses, volunteer
 11 organizations, and nonprofit entities.

12 (b) GENERAL RULE.—

13 (1) LIMITATION ON AWARD OF PUNITIVE DAM-
 14 AGES.—Punitive damages may, to the extent per-
 15 mitted by applicable Federal or State law, be award-
 16 ed in any civil action in any Federal or State court
 17 against a defendant if the claimant establishes by
 18 clear and convincing evidence that the harm suffered
 19 was the result of conduct that is either—

20 (A) specifically intended to cause harm; or

21 (B) carried out with conscious, flagrant
 22 disregard for the rights or safety of other
 23 persons.

24 (2) PROHIBITION OF PUNITIVE DAMAGES.—Pu-
 25 nitive damages may not be awarded in the absence

1 of an award of compensatory damages exceeding
2 nominal damages.

3 (c) LIMITATION CONCERNING CERTAIN DRUGS AND
4 MEDICAL DEVICES.—

5 (1) IN GENERAL.—Punitive damages shall not
6 be awarded pursuant to this section against a manu-
7 facturer or product seller of a drug (as defined in
8 section 201(g)(1) of the Federal Food, Drug, and
9 Cosmetic Act (21 U.S.C. 321(g)(1))) or medical de-
10 vice (as defined in section 201(h) of the Federal
11 Food, Drug, and Cosmetic Act (21 U.S.C. 321(h)))
12 which caused the claimant's harm where—

13 (A) such drug or device was subject to pre-
14 market approval by the Food and Drug Admin-
15 istration with respect to the safety of the for-
16 mulation or performance of the aspect of such
17 drug or device which caused the claimant's
18 harm or the adequacy of the packaging or label-
19 ing of such drug or device, and such drug or
20 device was in fact approved by the Food and
21 Drug Administration; or

1 (B) the drug or device is generally recog-
2 nized as safe and effective pursuant to condi-
3 tions established by the Food and Drug Admin-
4 istration and applicable regulations, including
5 packaging and labeling regulations.

6 (2) NONAPPLICABILITY.—The provisions of
7 paragraph (1) shall not apply in any case in which—

8 (A) the defendant, before or after pre-
9 market approval of a drug or device, withheld
10 from or misrepresented to the Food and Drug
11 Administration or any other agency or official
12 of the Federal Government required informa-
13 tion that is material and relevant to the per-
14 formance of such drug or device and is causally
15 related to the harm which the claimant alleg-
16 edly suffered; or

17 (B) the defendant made an illegal payment
18 to an official of the Food and Drug Administra-
19 tion for the purpose of either securing or main-
20 taining approval of such drug or device.

21 (d) PLEADING OF PUNITIVE DAMAGES.—No com-
22 plaint or other such pleading shall be filed containing a
23 prayer for relief seeking punitive damages in any civil ac-
24 tion subject to this section. A claimant may, however, pur-
25 suant to a pretrial motion and after a hearing before the

1 court, amend the complaint or other such pleading to in-
 2 clude a prayer for relief seeking punitive damages. The
 3 court shall allow such motion to amend if the claimant
 4 establishes at the hearing a reasonable likelihood of prov-
 5 ing facts at trial sufficient to support an award of punitive
 6 damages. Any such motion to amend shall be made not
 7 later than 30 days after the close of discovery. A prayer
 8 for relief added pursuant to this subsection shall not be
 9 barred by lapse of time under any statute prescribing or
 10 limiting the time within which an action may be brought
 11 or right asserted if the time prescribed or limited had not
 12 expired when the original pleading was filed.

13 (e) BIFURCATION AT DEFENDANT'S REQUEST.—

14 (1) SEPARATE PROCEEDING.—At the request of
 15 the defendant, the trier of fact shall consider in a
 16 separate proceeding whether punitive damages are to
 17 be awarded and the amount of such award.

18 (2) ADMISSIBILITY OF EVIDENCE.—If a sepa-
 19 rate proceeding is requested, evidence relevant only
 20 to the claim of punitive damages, as determined by
 21 applicable State law, shall be inadmissible in any
 22 proceeding to determine whether compensatory dam-
 23 ages are to be awarded. Evidence admissible in the
 24 separate proceeding for punitive damages may in-
 25 clude evidence of the defendant's profits, if any,

1 from its alleged wrongdoing, but shall not include
2 evidence of the defendant's overall wealth.

3 (f) PROPORTIONAL AWARDS.—

4 (1) IN GENERAL.—The amount of punitive
5 damages that may be awarded to a claimant in any
6 civil action subject to this title shall not exceed 3
7 times the amount of damages awarded to the claim-
8 ant for the economic damages, or \$250,000, which-
9 ever is greater. This provision shall be applied by the
10 court and shall not be disclosed to the jury.

11 (2) SPECIAL RULE.—

12 (A) LIMITATION.—Notwithstanding para-
13 graph (1), in any action described in such para-
14 graph against an individual whose net worth
15 does not exceed \$500,000 or against an owner
16 of an unincorporated business, or any partner-
17 ship, corporation, association, unit of local gov-
18 ernment, or organization which has fewer than
19 25 full-time employees, the punitive damages
20 shall not exceed the lesser of—

21 (i) 3 times the sum of the amount
22 awarded to the claimant for economic loss;

23 or

24 (ii) \$250,000.

1 (B) APPLICATION TO CORPORATIONS.—

2 For the purpose of determining the applicability
3 of this paragraph to a corporation, the number
4 of employees of a subsidiary or wholly owned
5 corporation shall include all employees of a par-
6 ent or sister corporation.

7 (g) APPLICABILITY AND PREEMPTION.—

8 (1) APPLICABILITY.—This section shall apply
9 to—

10 (A) any civil action brought in any Federal
11 or State court on any theory where punitive
12 damages are sought; and

13 (B) all civil actions in which the trial has
14 not commenced before the effective date of this
15 Act.

16 (2) PREEMPTION.—This section supersedes
17 State law only to the extent that State law applies
18 to an issue covered by this section. Any issue that
19 is not governed by this section shall be governed by
20 applicable State or Federal law.

21 **SEC. 104. EFFECT ON OTHER LAW.**

22 Nothing in this title shall be construed to—

23 (1) waive or affect any defense of sovereign im-
24 munity asserted by any State under any law;

25 (2) supersede any Federal law;

1 (3) waive or affect any defense of sovereign im-
2 munity asserted by the United States;

3 (4) affect the applicability of any provision of
4 chapter 97 of title 28, United States Code;

5 (5) preempt State choice-of-law rules with re-
6 spect to claims brought by a foreign nation or a citi-
7 zen of a foreign nation;

8 (6) affect the right of any court to transfer
9 venue or to apply the law of a foreign nation or to
10 dismiss a claim of a foreign nation or of a citizen
11 of a foreign nation on the ground of inconvenient
12 forum; or

13 (7) create a cause of action for punitive
14 damages.

15 **TITLE II—JOINT AND SEVERAL** 16 **LIABILITY REFORM**

17 **SEC. 201. SEVERAL LIABILITY FOR NONECONOMIC LOSS.**

18 (a) FINDINGS.—The Congress finds that—

19 (1) because of the joint and several liability
20 doctrine, municipalities, volunteer groups, nonprofit
21 entities, property owners, and large and small busi-
22 nesses are often brought into litigation despite the
23 fact that their conduct often had little or nothing to
24 do with the accident or transaction giving rise to the
25 lawsuit;

1 (2) noneconomic damages are not assessed pur-
 2 suant to any objective criteria and are therefore im-
 3 possible to quantify, leading to unpredictable, highly
 4 subjective and often excessive awards;

5 (3) the imposition of joint and several liability
 6 for noneconomic damages frequently results in the
 7 assessment of unfair and disproportionate damages
 8 against defendants that bear no relationship to their
 9 fault or responsibility; and

10 (4) the unfair allocation of noneconomic dam-
 11 ages under the joint and several liability doctrine
 12 disrupts, impairs, and burdens interstate commerce,
 13 imposing unreasonable and unjustified costs on con-
 14 sumers, taxpayers, governmental entities, large and
 15 small businesses, volunteer organizations, and non-
 16 profit entities.

17 (b) DEFINITIONS.—In this section

18 (1) ECONOMIC DAMAGES.—The term “economic
 19 damages” means objectively verifiable monetary
 20 losses including medical expenses, loss of earnings,
 21 burial costs, loss of use of property, costs of repair
 22 or replacement, costs of obtaining substitute domes-
 23 tic services, loss of employment and loss of business
 24 or employment opportunities.

1 (2) NONECONOMIC DAMAGES.—The term “non-
2 economic damages” means subjective, nonmonetary
3 losses including, but not limited to, pain, suffering,
4 inconvenience, mental suffering, emotional distress,
5 loss of society and companionship, loss of consor-
6 tium, injury to reputation and humiliation.

7 (c) IN GENERAL.—In any civil action for personal in-
8 jury, wrongful death, or based upon principles of compara-
9 tive fault, the liability of each defendant for noneconomic
10 damages shall be several only and shall not be joint. Each
11 defendant shall be liable only for the amount of non-
12 economic damages allocated to such defendant in direct
13 proportion to such defendant’s percentage of responsibility
14 as determined under subsection (d). A separate judgment
15 shall be rendered against such defendant for that amount.

16 (d) PROPORTION OF RESPONSIBILITY.—For pur-
17 poses of this section, the trier of fact shall determine the
18 proportion of responsibility of each person for the claim-
19 ant’s harm whether or not such person is a party to the
20 action.

21 (e) APPLICABILITY AND PREEMPTION.—This section
22 shall not preempt or supersede any Federal or State law
23 to the extent that such law would further limit the applica-
24 tion of joint liability to any kind of damages.

1 **TITLE III—CIVIL PROCEDURAL**
2 **REFORM**

3 **SEC. 301. TRIAL LAWYER ACCOUNTABILITY.**

4 (a) SENSE OF THE CONGRESS.—It is the sense of the
5 Congress that each State should require, under penalty
6 of law, each attorney admitted to practice law in such
7 State to disclose in writing, to any client with whom such
8 attorney has entered into a contingency fee agreement—

9 (1) the actual services performed for such client
10 in connection with such agreement;

11 (2) the precise number of hours actually ex-
12 pended by such attorney in the performance of such
13 services; and

14 (3) whether a referral fee was paid to any other
15 person.

16 (b) STUDY AND DEVELOPMENT OF MODEL LEGISLA-
17 TION.—The Attorney General of the United States shall—

18 (1) study and evaluate contingent fee awards
19 and their abuses in cases arising in State and Fed-
20 eral court, with particular emphasis on cases in
21 which the resulting fees received by attorneys are
22 grossly disproportionate to the fees such attorneys
23 would command if they offered identical services on
24 an hourly rate competitive with that available in the
25 relevant legal market;

1 (2) develop model State legislation—

2 (A) containing the requirements described
3 in subsection (a); and

4 (B) based on the study conducted under
5 paragraph (1), to curb abuses of contingent fee
6 awards, taking into particular account—

7 (i) the risk that individual clients may
8 end up in an unduly weak bargaining posi-
9 tion where they, for lack of available funds
10 up front, are unable to pay an hourly rate
11 and shall enter into a contingent fee agree-
12 ment if they are to obtain legal services;

13 (ii) the danger that such clients may
14 ultimately pay what are effectively fla-
15 grantly excessive hourly rates;

16 (iii) the ways in which requiring attor-
17 neys to disclose to clients the hours ex-
18 pended on a contingent fee case may im-
19 prove civil justice, enhance the recovery re-
20 ceived by injured persons, and eliminate
21 abusive practices by attorneys who take
22 advantage of vulnerable clients;

23 (iv) the possibility that similar bene-
24 ficial effects may accrue from requiring, in

1 contingent fee cases, pre-agreement disclo-
2 sure of an attorney's best estimate of the
3 hours that a case will require if it proceeds
4 to various stages, the likelihood and
5 amount of an award expected at various
6 stages, and the attorney's hourly rate for
7 the legal services required;

8 (v) the further possibility that other
9 disclosure requirements or restrictions on
10 contingent fee awards may enhance civil
11 justice; and

12 (vi) the possibility that any other in-
13 equities in attorney fee payment in contin-
14 gent fee cases may appropriately be ad-
15 dressed through legislation, such as inequi-
16 ties that might result where an attorney
17 receives a fee award from a court but still
18 receives a full contingent fee award such
19 that the client receives no benefit whatso-
20 ever from court-awarded fees; and

21 (3) prepare and disseminate to State authorities
22 the findings made and model legislation developed as
23 a result of the study and evaluation.

1 (c) REPORTING REQUIREMENTS.—Not later than the
 2 date that is 1 year after the effective date of this Act,
 3 the Attorney General shall report to the Congress—

4 (1) the findings of the study and the model leg-
 5 islation required by this section; and

6 (2) recommendations based on the findings on
 7 the need for and appropriateness of further action
 8 by the Federal Government.

9 **SEC. 302. HONESTY IN EVIDENCE.**

10 Rule 702 of the Federal Rules of Evidence is amend-
 11 ed—

12 (1) by inserting “(a) IN GENERAL.—” before
 13 “If”, and

14 (2) by adding at the end the following:

15 “(b) ADEQUATE BASIS FOR OPINION.—

16 “(1) Testimony in the form of an opinion by a
 17 witness that is based on scientific, technical or medi-
 18 cal knowledge shall be inadmissible in evidence un-
 19 less the court determines that such opinion—

20 “(A) is based on scientifically valid
 21 reasoning;

22 “(B) is sufficiently reliable so that the pro-
 23 bative value of such evidence outweighs the
 24 dangers specified in rule 403; and

1 “(C) the techniques, methods, and theories
 2 used to formulate that opinion are generally ac-
 3 cepted within the relevant scientific, medical, or
 4 technical field.

5 “(2) In determining whether an opinion satis-
 6 fies conditions in paragraph (1), the court shall
 7 consider—

8 “(A) whether the opinion and any theory
 9 on which it is based have been experimentally
 10 tested;

11 “(B) whether the opinion has been pub-
 12 lished in peer-review literature; and

13 “(C) whether the theory or techniques sup-
 14 porting the opinion are sufficiently reliable and
 15 valid to warrant their use as support for the
 16 proffered opinion.

17 “(c) EXPERTISE IN THE FIELD.—Testimony in the
 18 form of an opinion by a witness that is based on scientific,
 19 technical, or medical knowledge shall be inadmissible in
 20 evidence unless the witness’s knowledge, skill, experience,
 21 training, education, or other expertise lies in the particular
 22 field about which such witness is testifying.

23 “(d) DISQUALIFICATION.—Testimony by a witness
 24 who is qualified as described in subsection (a) is inadmis-
 25 sible in evidence if such witness is entitled to receive any

1 compensation contingent on the legal disposition of any
 2 claim with respect to which such testimony is offered.”.

3 **SEC. 303. FAIR SHIFTING OF COSTS AND REASONABLE AT-**
 4 **TORNEY FEES.**

5 (a) IN GENERAL.—Rule 68 of the Federal Rules of
 6 Civil Procedure is amended to read as follows:

7 **“Rule 68. Offer of judgment or settlement**

8 “(a) OFFER OF JUDGMENT OR SETTLEMENT.—At
 9 any time, any party may serve upon an adverse party a
 10 written offer to allow judgment to be entered against the
 11 offering party or to settle a case for the money, property,
 12 or to such effect as the offer may specify, with costs then
 13 accrued.

14 “(b) ACCEPTANCE OR REJECTION OF OFFERS.—If
 15 within 21 days after service of the offer, or such additional
 16 time as the court may allow, the adverse party serves writ-
 17 ten notice that the offer is accepted, either party may then
 18 file the offer and notice of acceptance together with proof
 19 of service thereof and thereupon the clerk, or the court
 20 if so required, shall enter judgment. An offer not accepted
 21 shall be deemed withdrawn and evidence thereof is not ad-
 22 missible except in a proceeding to determine costs and rea-
 23 sonable attorney fees.

24 “(c) DETERMINATION OF FINAL JUDGMENTS.—If
 25 the judgment finally obtained is not more favorable to the

1 offeree than the offer, then the offeree shall pay the actual
 2 costs and reasonable attorney fees incurred after the expi-
 3 ration of the time for accepting the offer, but only to the
 4 extent necessary to make the offeror whole for actual costs
 5 and reasonable attorney fees incurred as a consequence
 6 of the rejection of the offer. When comparing the amount
 7 of any offer of settlement to the amount of a final judg-
 8 ment actually awarded, any amount of the final judgment
 9 representing interest subsequent to the date of the offer
 10 in settlement shall not be considered.

11 “(d) DETERMINATION OF COSTS.—(1) Upon the mo-
 12 tion of either party, the court shall hold a hearing at which
 13 the parties may prove costs and reasonable attorney fees,
 14 and, upon hearing the evidence, the court shall enter an
 15 appropriate order or judgment under this section.

16 “(2) Allowable costs under this rule shall include—

17 “(A) filing, motion, and jury fees;

18 “(B) juror food and lodging while the jury is
 19 kept together during trial and after the jury retires
 20 for deliberation;

21 “(C) taking, videotaping, and transcribing nec-
 22 essary depositions including an original and one
 23 copy of those taken by the claimant and one copy of
 24 depositions taken by the party against whom costs

1 are allowed, and travel expenses to attend
2 depositions;

3 “(D) service of process by a public officer, reg-
4 istered process server, or other means;

5 “(E) expenses of attachment;

6 “(F) premiums on necessary surety bonds;

7 “(G) ordinary witness fees;

8 “(H) fees of expert witnesses who are not regu-
9 lar employees of any party;

10 “(I) transcripts of court proceedings;

11 “(J) attorney fees, when authorized by contract
12 or law;

13 “(K) court reporters’ fees;

14 “(L) models and blowups of exhibits and photo-
15 copies of exhibits may be allowed if they were rea-
16 sonably helpful to aid the trier of fact; and

17 “(M) any other item that is required to be
18 awarded to the prevailing party pursuant to statute
19 as an incident to prevailing in the action at trial or
20 on appeal.

21 “(3) Unless expressly authorized by law, allowable
22 costs under this rule shall not include—

23 “(A) investigation expenses in preparing the
24 case for trial;

1 “(B) postage, telephone, facsimile, and
2 photocopying charges, except for exhibits;

3 “(C) costs in investigation of jurors or in prepa-
4 ration for voir dire; and

5 “(D) transcripts of court proceedings not or-
6 dered by the court.

7 “(e) DETERMINATION OF LIABILITY.—When the li-
8 ability of one party to another has been determined by
9 verdict of order or judgment, but the amount or extent
10 of the liability remains to be determined by further pro-
11 ceedings, any party may make an offer of judgment, which
12 shall have the same effect as an offer made before trial,
13 except that a court may shorten the period of time an
14 offeree may have to accept an offer, but in no case to less
15 than 10 days.

16 “(f) SUBSEQUENT OFFERS.—The fact that an offer
17 is made but not accepted does not preclude a subsequent
18 offer. An offeror shall not be deprived of the benefits of
19 an offer by a subsequent offer, unless and until the offeror
20 fails to accept an offer more favorable than the judgment
21 obtained.

22 “(g) NONMONETARY AWARDS.—If the judgment ob-
23 tained includes nonmonetary relief, a determination that
24 it is more favorable to the offeree than was the offer shall

1 be made only when the terms of the offer included such
2 nonmonetary relief.

3 “(h) REDUCTION OF AWARD TO AVOID UNDUE
4 HARDSHIP.—A court may reduce an award of costs and
5 reasonable attorney fees by up to 50 percent of the award
6 if the court finds special circumstances that make a full
7 award of attorney fees and costs unjust.

8 “(i) REASONABLE ATTORNEY’S FEES.—For pur-
9 poses of this rule, a reasonable attorney’s fee shall be cal-
10 culated on the basis of an hourly rate which shall not ex-
11 ceed that which is considered acceptable in the community
12 in which the attorney practices, considering the attorney’s
13 qualifications and experience and the complexity of the
14 case.

15 “(j) APPLICABILITY.—This rule shall not apply to
16 class and derivative actions under rules 23, 23.1, and
17 23.2.”.

18 (b) APPLICATION.—The provisions of rule 68 of the
19 Federal Rules of Civil Procedure (as amended by sub-
20 section (a) of this section) shall supersede any statute
21 that—

22 (1) provides for the shifting of costs by which
23 a specified party makes payment; and

24 (2) does not provide for the shifting of costs by
25 which such party may receive payment.

TITLE IV—HEALTH CARE LIABILITY REFORM

SEC. 401. DEFINITIONS.

In this title:

(1) CLAIMANT.—The term “claimant” means any person who asserts a health care liability claim or who files a health care liability action, including a person who asserts or claims a right to legal or equitable contribution, indemnity or subrogation, arising out of a health care liability claim or action, and any person on whose behalf such a claim is asserted or such an action is brought, whether deceased, incompetent, or a minor.

(2) ECONOMIC DAMAGES.—The term “economic damages” has the same meaning as defined under section 101(4).

(3) HEALTH CARE LIABILITY ACTION.—The term “health care liability action” means a civil action brought in a Federal or State court, against a health care provider, an entity which is obligated to provide or pay for health benefits under any health plan (including any person or entity acting under a contract or arrangement to provide or administer any health benefit), or the manufacturer, distributor, supplier, marketer, promoter, or seller of a medical

product, in which the claimant alleges a claim (including third party claims, cross claims, counter claims, or distribution claims) based upon the provision of (or the failure to provide or pay for) health care services or the use of a medical product, regardless of the theory of liability on which the claim is based, or the number of plaintiffs, or defendants or causes of action.

SEC. 402. LIMITATION ON NONECONOMIC DAMAGES IN HEALTH CARE LIABILITY ACTIONS.

(a) MAXIMUM AWARD OF NONECONOMIC DAMAGES.—

(1) IN GENERAL.—In any health care liability action, in addition to actual damages or punitive damages, or both, a claimant may also be awarded noneconomic damages (including damages awarded to compensate injured feelings, such as pain and suffering and emotional distress) in an amount not to exceed the maximum amount described in paragraph (2).

(2) MAXIMUM AMOUNT.—The maximum amount described in this paragraph is \$250,000, regardless of—

(A) the number of parties against whom the health care liability action is brought; or

1 (B) the number of claims or actions
 2 brought with respect to the health care injury.

3 (3) NO DISCOUNTING TO PRESENT VALUE.—An
 4 award for future noneconomic damages in a health
 5 care liability action shall not be discounted to
 6 present value.

7 (4) REDUCTION IN JURY AWARD.—

8 (A) IN GENERAL.—With respect to a
 9 health care liability action heard by a jury, the
 10 jury shall not be informed about the limitation
 11 on noneconomic damages, but any award for
 12 noneconomic damages in excess of \$250,000
 13 shall be reduced either before the entry of judg-
 14 ment or by amendment of the judgment after
 15 entry.

16 (B) ORDER OF REDUCTIONS.—(i) An
 17 award of damages for noneconomic losses in ex-
 18 cess of \$250,000 shall be reduced to \$250,000
 19 before accounting for any other reduction in
 20 damages required by law.

21 (ii) If separate awards of damages for past
 22 and future noneconomic damages are rendered
 23 and the combined award exceeds \$250,000, the
 24 award of damages for future noneconomic
 25 losses shall be reduced first.

1 (b) APPLICABILITY.—This section—

2 (1) shall apply to any health care liability action
3 brought in any Federal or State court on any theory
4 where noneconomic damages are sought;

5 (2) does not create a cause of action for non-
6 economic damages;

7 (3) does not preempt or supersede any Federal
8 or State law to the extent that such law would fur-
9 ther limit the award of noneconomic damages; and

10 (4) does not preempt any State law enacted be-
11 fore the date of the enactment of this Act that
12 places a cap on the total liability in a health care li-
13 ability action.

14 **SEC. 403. STATUTE OF LIMITATIONS.**

15 (a) IN GENERAL.—Except as provided in subsection
16 (b), no health care liability action may be initiated after
17 the expiration of the 2-year period that begins on the date
18 on which the alleged injury and its cause was or should
19 reasonably have been discovered, but in no event later
20 than 6 years after the date of the alleged occurrence of
21 the injury.

22 (b) EXCEPTION FOR MINORS.—In the case of an al-
23 leged injury suffered by a minor who has not attained 6
24 years of age, no health care liability action may be initi-
25 ated after the expiration of the 2-year period that begins

1 on the date on which the alleged injury and its cause was
 2 or should reasonably have been discovered, but in no event
 3 later than 6 years after the date of the alleged occurrence
 4 of the injury and its cause or the date on which the minor
 5 attains 12 years of age, whichever is later.

6 **SEC. 404. PERIODIC PAYMENT OF FUTURE DAMAGES.**

7 (a) NEGOTIATED AGREEMENT FOR PERIODIC PAY-
 8 MENT OF FUTURE DAMAGES.—In any health care liability
 9 action in which the damages awarded for any losses to
 10 be incurred after the date on which the decision or judg-
 11 ment is entered (hereafter in this section referred to as
 12 “future damages”) exceeds \$100,000, the court shall pro-
 13 vide that the parties to the action shall have 60 days to
 14 negotiate and consent to an agreement to provide for the
 15 payment of such damages in a lump sum, periodic install-
 16 ment payments, or a combination of both.

17 (b) COURT DETERMINED PERIODIC PAYMENT OF
 18 FUTURE DAMAGES.—If the parties to health care liability
 19 action described in subsection (a) fail to agree on the
 20 terms and amount of payments of future damages pursu-
 21 ant to such subsection, a defendant may elect to pay the
 22 future damages on a periodic basis instead of a single
 23 lump-sum payment. If the defendant elects to make peri-
 24 odic payments, the periods for such payments and the
 25 amount of such payments shall be determined by the

1 court, based upon projections of such future losses and
 2 costs. For purposes of determining the total amount of
 3 future damages, the court shall reduce the amounts to be
 4 paid to present value for purposes of determining the
 5 funding obligation of the individual required to make such
 6 periodic payments.

7 (c) CONDITIONS FOR THE TERMINATION OF FUTURE
 8 DAMAGES PAYMENTS.—

9 (1) IN GENERAL.—Except as provided in para-
 10 graph (2), periodic payments for future damages
 11 shall terminate in the event of the death of the
 12 claimant or in the event of the claimant's recovery
 13 or return to work.

14 (2) EXCEPTION FOR INDIVIDUALS WHO ARE
 15 OWED A DUTY OF SUPPORT.—The portion of any
 16 periodic payment allocable to loss of future earnings
 17 shall be paid to any individual to whom the claimant
 18 owed a duty of support immediately prior to the
 19 claimant's death to the extent such duty of support
 20 exists under applicable law at the time of death.
 21 Such payments shall terminate at the earlier of the
 22 death of the last person to whom a duty of support
 23 is owed or the expiration of the payment obligation
 24 pursuant to the judgment for periodic payments.

1 **SEC. 405. STATE NO-FAULT DEMONSTRATION PROJECTS.**

2 (a) DEFINITIONS.—In this section:

3 (1) MEDICAL ADVERSE EVENT.—The term
4 “medical adverse event” means an injury that is the
5 result of medical management as opposed to a dis-
6 ease process that creates disability lasting at least 1
7 month after discharge, or that prolongs a hos-
8 pitalization for more than 1 month, and for which
9 compensation is available under a no-fault medical
10 liability system established under this section.

11 (2) NO-FAULT MEDICAL LIABILITY SYSTEM.—
12 The terms “no-fault medical liability system” and
13 “system” mean a system established by a State con-
14 ducting a demonstration project under this section
15 that replaces the common law tort liability system
16 for medical injuries with respect to certain qualified
17 health care organizations and qualified insurers and
18 which meets the requirements of this section.

19 (3) PROVIDER.—The term “provider” means
20 physician, physician assistant, or other individual
21 furnishing health care services in affiliation with a
22 qualified health care organization.

1 (4) QUALIFIED HEALTH CARE ORGANIZA-
2 TION.—The term “qualified health care organiza-
3 tion” means a hospital, a hospital system, a man-
4 aged care network, or other entity determined appro-
5 priate by the Secretary that elects in a State con-
6 ducting a demonstration project under this section
7 to participate in a no-fault medical liability system
8 and meets the requirements of this section.

9 (5) QUALIFIED INSURER.—The term “qualified
10 insurer” means a health care malpractice insurer,
11 including a self-insured qualified health care organi-
12 zation, that elects in a State conducting a dem-
13 onstration project under this section to participate
14 in a no-fault medical liability system and meets the
15 requirements of this section.

16 (b) ESTABLISHMENT.—The Secretary of Health and
17 Human Services (hereafter in this section referred to as
18 the “Secretary”) shall award grants to 1 or more States
19 to establish demonstration projects under which the State
20 establishes a no-fault medical liability system in accord-
21 ance with this section.

22 (c) APPLICATIONS BY STATES.—

23 (1) IN GENERAL.—To be eligible to receive a
24 grant under this section, a State shall prepare and
25 submit to the Secretary an application at such time,

1 in such manner, and containing such information as
2 the Secretary may require, including the following
3 information:

4 (A) Identification of the State agency or
5 agencies that will administer the no-fault medi-
6 cal liability system and be the grant recipient of
7 funds for the State.

8 (B) Identification of each qualified health
9 care organization selected by the State to par-
10 ticipate in the system, including—

11 (i) the location of each organization;

12 (ii) the number of patients generally
13 served by each organization;

14 (iii) the types of patients generally
15 served by each organization;

16 (iv) an analysis of any characteristics
17 of each organization that makes the orga-
18 nization appropriate for participation in
19 the system;

20 (v) whether the organization is self-in-
21 sured for malpractice liability; and

22 (vi) such other information as the
23 Secretary determines appropriate.

1 (C) Identification of each qualified insurer
2 selected by the State to participate in the sys-
3 tem including—

4 (i) a schedule of the malpractice in-
5 surance premiums generally charged by
6 each insurer under the common law tort li-
7 ability system; and

8 (ii) such other information as the Sec-
9 retary determines appropriate.

10 (D) A description of the procedure under
11 which qualified health care organizations and
12 insurers elect to participate in the system.

13 (E) A description of the system established
14 by the State to assure compliance with the re-
15 quirements of this section by each qualified
16 health care organization and insurer.

17 (F) A description of how funds granted to
18 a State will be expended and a description of
19 fiscal control, accounting, and audit procedures
20 to assure the proper disbursement of and ac-
21 counting for funds received under this section.

22 (G) A description of procedures for the
23 preparation and submission to the State of an

1 annual report by each qualified health care or-
 2 ganization and qualified insurer participating in
 3 a system that shall include—

4 (i) a description of activities con-
 5 ducted under the system during the year;
 6 and

7 (ii) the extent to which the system ex-
 8 ceeded or failed to meet relevant perform-
 9 ance standards including compensation for
 10 and deterrence of medical adverse events.

11 (2) CONSIDERATION OF APPLICATIONS.—In re-
 12 viewing all applications received from States desiring
 13 to establish demonstration projects under this sec-
 14 tion, the Secretary shall consider—

15 (A) data regarding medical malpractice
 16 litigation patterns in each State;

17 (B) the contributions that any system shall
 18 make toward reducing costs associated with
 19 health care injuries;

20 (C) diversity among the populations served
 21 by the systems;

22 (D) geographic distribution; and

23 (E) such other criteria as the Secretary de-
 24 termines appropriate.

1 (d) WAIVER.—The Secretary may waive compliance
2 with any requirement of this section applicable to health
3 care negligence to permit the operation of a demonstration
4 project established under this section.

5 (e) DURATION.—A demonstration project under this
6 section shall be conducted for a period of not more than
7 5 years.

8 (f) EVALUATION AND REPORTS.—

9 (1) BY THE STATES.—Each State conducting a
10 demonstration project under this section shall con-
11 duct ongoing evaluations of the effectiveness of any
12 no-fault medical liability system established in such
13 State and shall submit an annual report to the Sec-
14 retary concerning the results of such evaluations at
15 such times and in such manner as the Secretary
16 shall require. The report shall—

17 (A) incorporate information from annual
18 reports submitted to the State by qualified
19 health care organizations and insurers partici-
20 pating in the system;

21 (B) include an analysis of the feasibility
22 and desirability of developing and implementing
23 a no-fault medical liability program; and

1 (C) include a recommendation for legisla-
2 tion on the development and implementation of
3 no-fault medical liability programs.

4 (2) BY THE SECRETARY.—The Secretary shall
5 submit an annual report to the Congress concerning
6 the effectiveness of the demonstration projects con-
7 ducted under this section. Such report shall analyze
8 the reports received by the Secretary under para-
9 graph (1).

10 (g) LIMITATIONS ON USE OF GRANTS.—

11 (1) ADMINISTRATIVE EXPENSES.—Not more
12 than 10 percent of the amount of each grant award-
13 ed to a State under this section may be used for ad-
14 ministrative expenses.

15 (2) WAIVER OF LIMITATION.—The limitation
16 under paragraph (1) may be waived as determined
17 appropriate by the Secretary.

18 (h) AUTHORIZATION OF APPROPRIATIONS.—There
19 are authorized to be appropriated such sums as may be
20 necessary to carry out the purposes of this section.

1 **TITLE V—MISCELLANEOUS**
2 **PROVISIONS**

3 **SEC. 501. FEDERAL CAUSE OF ACTION PRECLUDED.**

4 This Act shall not provide a basis for Federal court
5 jurisdiction pursuant to section 1331 or 1337 of title 28,
6 United States Code.

7 **SEC. 502. EFFECTIVE DATE.**

8 Except as otherwise provided in this Act, this Act and
9 the amendments made by this Act shall take effect 30
10 days after the date of its enactment and shall apply to
11 all civil actions commenced on or after such date, includ-
12 ing any action in which the harm or the conduct which
13 caused the harm occurred before the effective date of this
14 Act.

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